

Modernising Judicial Terms and Conditions Consultation

**A response by
The Chartered Institute of Legal Executives**

November 2016



1. Introduction

- 1.1. The Chartered Institute of Legal Executives (CILEx) is the professional association and governing body for Chartered Legal Executive lawyers, other legal practitioners and paralegals. CILEx represents around 20,000 members, which includes approximately 7,500 fully qualified Chartered Legal Executive lawyers.
- 1.2. CILEx continually engages in the process of policy and law reform. At the heart of this engagement is public interest, as well as that of the profession. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform. CILEx endeavours to ensure relevant regard is given to equality and human rights, and the need to ensure justice is accessible for those who seek it.
- 1.3. CILEx has continually engaged with the Ministry of Justice, the Judicial Appointments Commission, the Judiciary and others to promote judicial careers to our members. However if we are to effectively address the diversity deficit in the judiciary then it is essential to make serious efforts to promote judicial careers to the most diverse group of lawyers and legal professionals in the country; CILEx members.
- 1.4. Three-quarters of Chartered Legal Executives are women, and one-third of our new students are from BAME backgrounds. They are trained through vocational and apprenticeship routes, meaning they represent the best in social mobility. CILEx lawyers are brimming with potential, and are an untapped pool of talent who are currently shut out from higher judicial appointments. On that basis, the four proposals to improve diversity announced on 09 November 2016 by the Lord Chancellor were a missed opportunity in their lack of recognition of the potential contribution Chartered Legal Executives can make.
- 1.5. [Research](#) into barriers to judicial appointment released in 2013 by the Judicial Appointments Commission identified that a lack of support from employers was one of the key reasons why Chartered Legal Executives did not make applications. This was despite being generally more positive than other lawyers about a number of aspects of judicial work, including 'making a difference to the law', 'change of career focus', and 'interesting work'. This indicates that the terms and conditions for judges should be more tailored towards the experience of employed lawyers, and this evidence, as well as feedback from our members, has informed this response.

2. Question 1: Should new fee-paid judges in both the courts and tribunals be on a single non-renewable fixed term? Please give your reasons.

- 2.1. No, fixed terms are likely to reduce applications from Chartered Legal Executives and Solicitors, the majority of whom are employed thus increasing the percentage of those appointed from the Bar who are self-employed.
- 2.2. There is amongst employers an unwillingness to allow their staff the time to commit to a fee paid role such that acceptance of a fee paid judicial role necessarily impacts negatively on career progression and career prospects within private law firms. The move to a fixed term will for some involve a return back to their original jobs at the end of the term. The judge's private

client career prospects will have been compromised significantly in the intervening period particularly in the case of younger fee paid appointees.

- 2.3. If a fixed term is required in the knowledge that this is a step in the pathway to full time judicial roles, the appointment will be seen, in effect, as an eight year notice period by employers resulting in gradually reducing the workloads and client influence over that time period.

3. Question 2: If yes to question 1, should fee-paid judges should be able to apply for a different fee-paid role at the end of their term as an alternative to applying for salaried office? Please give your reasons.

- 3.1. The ability to move to a further fixed term would alleviate some of the concerns referred to in our answer to question 1 but there will still be potential damage to career prospects of Chartered Legal Executives and Solicitors, and career uncertainty which is likely to reduce the pool of applicants for fee paid roles rather than increase it.

4. Question 3: Are there exceptional circumstances in which the length of the fixed term should be extended? If so, which circumstances do you have in mind? Please explain.

- 4.1. It would be desirable to increase a fixed term for those with a specialism for which there is ongoing high demand for all roles such as Private Law.

5. Question 4: Should existing fee-paid judges also move onto the new fixed term? Please give your reasons.

- 5.1. No. In the majority of cases current fee-paid judges who are, or were employed, will have negotiated with their employers to secure their approval to work as a fee paid judge to the detriment of their existing terms and conditions. Their earnings may have been lowered; they may have to take some of their sittings as holidays, many have agreed to reduce their usual working week or moved to part time hours in order to facilitate sittings. There is also some resentment from senior partners to employees with other commitments.
- 5.2. It would be inequitable to so substantially alter the terms of the appointment for existing office holders retrospectively having regard to the difficulties that would present in many instances. Therefore existing fee-paid judges agreements should remain the same to avoid frustrating their agreements.

6. Question 5: If existing fee-paid judges were to move onto the new fixed term, should this be on a staggered basis? Please give your reasons.

- 6.1. Yes. The existing fee-paid judges should be provided with long notice periods so that they are able to plan their future career and possibly change employers as the appointment of judges is not viewed positively by firms.

7. Question 6: If the new term were introduced, what would be the most appropriate length of tenure: six, eight or ten years, or another period? Please give your reasons.

- 7.1. The investment in terms of time and resource for the training of fee paid judges is significant; a fixed term which is shorter would add considerably to such costs. Longer periods would minimise those costs.
- 7.2. The longer period of 10 years seems more realistic enabling anyone moving from fee paid to salaried roles to be in a position to take on the role with limited adjustment, the types of work that DDJ's in particular deal with is highly varied and the shorter term is actually quite limited when the time of training and the number of sittings per annum are taken into account.

8. Question 7: If you think the new fee-paid tenure would be desirable for new appointments and/or existing office holders, what steps should be taken to ensure the courts and tribunals retain the necessary level of expertise?

- 8.1. A new fee paid tenure would reduce the level of expertise when the length of some existing tenures is taken into account. This is because Chartered Legal Executives and Solicitors currently find it difficult to gain their firm's approval for fee-paid roles. The only means by which a high level of expertise could be retained is if there was a pathway to full time appointments.
- 8.2. This would likely require an overhaul of the appointment process together with the terms and conditions upon salaried appointment.
- 8.3. The appointments process is infrequent at present and accordingly would appear unlikely to result in maintaining the level of salaried judiciary and fee paid cover if tenures were reduced and the frequency of salaried appointments was retained.
- 8.4. The consultation makes an assumption that fee paid judges presently would seek to move to a salaried role, this is doubtful. The terms and conditions of salaried roles are not generally appealing to those with successful careers who are at the bar or employed in private solicitors practice.
- 8.5. The move to salaried roles can be unattractive due to the present issues over the location upon appointment, the need to take a potentially significant reduction in income and the pension arrangements.

9. Question 8: Should judges be appointed to leadership positions for a fixed term? Please explain.

- 9.1. Yes, if the position is separate from judicial responsibilities, the judge should be monitored and assessed for the competencies required. A fixed term will also allow for retiring judges to continue to provide leadership and mentoring once their judicial career has ended.

10. Question 9: Should Heads of Division positions also be set for a fixed term? Please explain.

- 10.1. Yes, for the reasons given above and to ensure that there is the opportunity for judges to gain experience in the role.

11. Question 10: Would a temporary uplift in remuneration for the duration of a fixed term leadership role to be appropriate? Please give your reasons.

11.1. Yes, the leadership role must be clearly defined. Some judges may carry out leadership and mentoring roles that are not defined within their job titles. For example, Judicial Diversity Community Relationship judges carry out leadership roles and this is not currently remunerated or compensated.

12. Question 11: Should all current fee-paid judges across the courts and tribunals be required in their terms to be available for a number of days rather than have a guaranteed number of sitting days? Please give your reasons.

12.1. It is agreed that judges should be paid for the days they sit and not claim for the days that they have not sat. It must however be taken into account that judges change their working patterns to allow for sitting in court over the year. They do not take on extra work if they are aware they may be called to sit at short notice. The days that they do sit therefore must be remunerated to take this into account.

13. Question 12: Should the terms and conditions of current fee-paid office holders be amended to remove the right to claim travel costs to their primary base in line with salaried office holders? Please give your reasons.

- 13.1. No, many fee-paid judges employed in private practice or in public sector roles are required to pass their fee paid income to their employers as compensation for the loss of fee income whilst away from the office or they are not paid for those days. This means privately employed, fee paid judges do not receive any additional remuneration for working as a judge. If travel costs to primary bases are not reimbursed, the judge will carry the cost.
- 13.2. This change would also create an anomaly in that self employed members of the bar (for example) may be able to reclaim travel costs incurred through their tax arrangements whereas employed Solicitors or Chartered Legal Executives could not do so. This would create an unintended consequence likely to limit applications from groups when the changes intend to encourage diversity.
- 13.3. Further the question of expenses for fee paid roles is not comparable with other workers in full time employment in the public sector or salaried judicial roles.
- 13.4. Fee-paid judges do not have certainty of sittings and generally sit in a variety of locations often significant distances from home and their primary work location. It is not realistic to expect or anticipate that fee paid judges might move house to a location in proximity to their primary court; this is a difficulty which would be compounded if there was the introduction of a fixed term which would either come to an end or alternatively result in a salaried role which may be a considerable distance from the primary court or circuit applicable during the period of fee paid tenure.
- 13.5. One of the benefits of the fee-paid system is the considerable flexibility it offers to HMCTS; sittings are not infrequently arranged the day before and on occasion the day of a sitting if there has been illness or unexpected absence, the non payment of travel costs would inevitably limit the flexibility currently enjoyed.

14. Question 13: Do you agree that judges should be required to give notice of their plans to resign or retire? Please give your reasons.

- 14.1. Yes, it is important for forward planning that judges are required to give notice. It will also assist the MOJ to provide notice to potential applicants of recruitment exercises. However, there should be provision for exceptional circumstances, such as ill-health.

15. Question 14: If a notice requirement for retirement or resignation were introduced, what would be the most appropriate period: three, six or twelve months, or another period? Please give your reasons.

- 15.1. Sittings are often booked up to 6 months in advance and accordingly 6 months would appear to be a realistic timetable balancing the interests of both parties.

16. Question 15: What period of notice should be given prior to the proposed changes to terms and conditions in this chapter being made? Please give your reasons.

- 16.1. To new applicants, the terms and conditions will be known upon application. For existing office holders we propose that at least 12 months' notice would be reasonable.
- 16.2. For some existing fee-paid holders this is their only occupation and alternative employment may need to be found. For others who are employed there may be a need to make alternative arrangements or negotiate revised terms and conditions with employers.
- 16.3. It is further suggested that the period of notice should go hand in hand with transitional arrangements enabling existing fee paid holders to move to salaried roles.

17. Question 16: Have we correctly identified the extent of the impacts under each of these proposals? Please give reasons and supply evidence as appropriate.

- 17.1. It is not felt that the consultation has a full understanding of the tensions which arise between the primary employment of solicitors and Chartered Legal Executives and appointment in a fee paid capacity.
- 17.2. It is likely that applications from minority groups, in relation to whom the change is directed, would for the most part come from private solicitor's practices rather from the Bar. The consultation should therefore consider the nuances between the different legal professions who wish to apply.
- 17.3. The change to a fixed tenure of itself is unlikely to result in the outcomes sought unless reasons for the limited number of successful applications from minority groups and from Solicitors or Chartered Legal Executives under the existing rules are fully understood.
- 17.4. It is highly probable that the present age profile of the existing salaried and fee-paid judicial appointments is not so much a bar to new applicants, but reflects that it is not until some years after qualification that Solicitors or Chartered Legal Executives have achieved the experience and competencies

to apply successfully, and achieved the level of seniority in private practice so as to enable the appointee to overcome resistance to that appointment with their employer.

18. Question 17: Are there any proposals, other than those in this consultation, that you consider would improve the judicial career path, help modernise the judiciary in line with wider reform, or improve judicial diversity? Please give reasons and supply evidence as appropriate.

- 18.1. At the moment, Chartered Legal Executives are limited in the judicial appointments they can apply for. There seems no good reason why suitably skilled and experienced Chartered Legal Executives should not be eligible for appointment as Circuit or High Court judges, or beyond. If career paths are being considered for judges, Chartered Legal Executives with at least seven years post Fellowship experience and competencies should be eligible to apply for these more senior posts. This would align with the requirement for barristers and solicitors.
- 18.2. We believe it would be beneficial for the Ministry of Justice to engage with employers and understand the considerations and impact employers have on applications so as to ensure that they do not fetter the career journey of potential judges in private practice. This will allow for a more diverse judiciary and ensure that the pool of applicants is wider.
- 18.3. The process of application to salaried roles and appointment would benefit from further consideration. The present practice of offering salaried roles to applicants often a long distance from their domicile on appointment may be less attractive to younger and more diverse applicants, and could lend itself to older applicants likely to have greater family and fiscal flexibility.

19. Question 18: Does the equalities statement correctly identify the extent of the equalities impacts under each of these proposals? Are there forms of mitigation in relation to impacts that we have not considered? Please give reasons and supply evidence as appropriate.

- 19.1. Professor Gus John's 2014 report should be considered to ensure that opportunity costs for all types of BAME lawyer are fully mitigated. The report commented on the challenges faced by BAME lawyers and sole practitioners. It highlighted the fact that many BAME law firms are situated in areas where a high percentage of individuals with protected characteristics reside and it is likely to affect how many BAME applicants apply or fail to apply.
- 19.2. CILEx would like to see greater profiling judges from BAME backgrounds and also those with protected characteristics to encourage more applications. It should also be noted that applicants with protected characteristics may already be within the judiciary but have not been encouraged to reveal their status. Confidence in becoming a judge with a protected characteristic must be encouraged by active engagement and promotion to applicants.

CILEx welcomes the opportunity to contribute to this consultation and we are happy to work with the Ministry of Justice on future consultations and workshops.

Please contact the writer below for further contributions that may be required from the answers provided.

For further details

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